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STATE OF NEW MEXICO  
BEFORE THE SECRETARY OF THE ENVIRONMENT

IN THE MATTER OF THE AGENCY  
INITIATED MODIFICATION OF THE  
HAZARDOUS WASTE FACILITY PERMIT  
FOR THE WASTE ISOLATION PILOT PLANT  
CARLSBAD, NEW MEXICO  
EPA ID NO. NM4890139088

No. HWB 04-01(M)



PERMITTEES' REPLY TO  
RESPONSE BY NMED HAZARDOUS WASTE BUREAU  
TO PERMITTEES' MOTION TO DISMISS

COME NOW the Permittees, by and through undersigned counsel of record, and submit the following in reply to the Response by the NMED Hazardous Waste Bureau to Permittees' Motion to Dismiss.

I. LACK OF SUBJECT MATTER JURISDICTION

The Permittees have requested that the State's proposed permit modification be dismissed for lack of subject matter jurisdiction, which is identical to a Rule 12(b)(1) motion under the Rules of Civil Procedure. For purposes of a motion to dismiss for lack of subject matter jurisdiction, the facts alleged in the initial pleading are not taken as true. 5A Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure*, §1350 at 212 (1990 and 2003 Supplement); *Wojton v. U.S.*, 199 F.Supp.2d 722 (D.C.Ohio 2002); *MetLife Capital Corp. v. Water Quality Ins. Syndicate*, 198 F.Supp. 2002 (D.C.Puerto Rico 2002). Because a challenge to subject matter jurisdiction addresses the authority to hear the claims, the Court, or in this case the Hearing Officer, has "an affirmative obligation to ensure that [she] is acting within the scope of [her] jurisdictional power." Wright & Miller, 2003 Supplement at 166; *In re Application of Gas Co. of New Mexico*, 124 N.M. 176, ¶6, 947 P.2d 133 (S.Ct. 1997). No presumptive weight should be given to the jurisdictional averments contained in the initial pleading. *Id.* at 167;

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*Tasini v. New York Time Co.*, 184 F.Supp.2d 350 (D.C.N.Y. 2002). Instead, the Hearing Officer should "engage in differential fact finding to resolve the factual dispute between the parties before ruling on jurisdiction." Wright & Miller, 2003 Supplement at 167, fnt 31.5; *In re Application of Gas Co. of N.M.*, 124 N.M. 176, ¶23, 947 P.2d 133 (S.Ct. 1997)(Justice Minzner dissent, citing to Moore's Federal Practice §12.07, at 12-52). The moving party "may use affidavits and other matter to support the motion" to dismiss for lack of subject matter jurisdiction. *Id.*, 1990 volume at 213.

NMED, in its response to the Motion to Dismiss, concedes that it does not have regulatory authority over the radiological component of TRU mixed waste. Response to Motion to Dismiss, at 2-4. Based on the doctrine of federal preemption, NMED is not only prohibited from directly regulating the radiological component of mixed waste, it is prohibited from doing so indirectly on the pretense of regulating the hazardous waste component of mixed waste. When a particular field is preempted, the state may not, by the enactment of a permit condition "that can only be characterized as a subterfuge," overcome federal preemption. *Rollins Environmental Services, Inc. v. Parish of St. James*, 775 F.2d 627 (5<sup>th</sup> Cir. 1985); *Ensco, Inc. v. Dumas*, 807 F.2d 743 (8<sup>th</sup> Cir. 1986). In *Rollins*, a county government passed an ordinance that the Court found was a pretext in order to avoid federal preemption under the Toxic Substances Control Act (TSCA). In determining that the ordinance was preempted by federal law, the Court "look[ed] to its purpose and effect. Guidance in interpreting the Ordinance is provided by (1) the chronology of events leading up to its passage; (2) the testimony below on several notable features of the Ordinance; and (3) the explicit findings of fact made by the trial judge." *Id.* The Court also examined the "motives and intentions" of the officials who enacted the Ordinance in order to understand "the real meaning and import" of the Ordinance. *Id.* Based on a review of

the circumstances surrounding the passage of the Ordinance, the trial court found that "the end result sought by this Ordinance is to do exactly what you say it isn't to do," which was to avoid the restrictions of federal preemption. *Id.* Although the Ordinance did not directly regulate any substances under TSCA, the Court concluded that it was an "impermissible intrusion into territory preempted under TSCA and that enforcement of it would violate the Supremacy Clause of the federal Constitution." *Id.*

NMED may not indirectly regulate the radiological component of hazardous waste through the RCRA permit program. "The AEA preempts *any* state attempt to regulate materials covered by the Act for safety purposes." *United States v. Commonwealth of Kentucky*, 252 F.3d 816 (D.D.C. 1999). Kentucky attempted to justify its regulation of radioactive material on the basis that it had the "right under state law" to prohibit any radioactive materials from being placed in a landfill. Relying on precedent from the United States Supreme Court, the court rejected the State's reasoning. The Supreme Court held that "State safety regulation is not preempted only when it conflicts with federal law. Rather, the federal government has occupied the entire field of nuclear safety concerns." *Pacific Gas & Elec Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983). In order for a state regulatory action to be preempted under the AEA, it is not necessary to "identify specific conflicts between the challenged conditions and federal law." *Commonwealth of Kentucky, supra*. "When the federal government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether the matter on which the state asserts the right to act is in any way regulated by the federal government." *Pacific Gas & Elec.*, 461 U.S. at 213. NMED has recognized that the AEA preempts the regulation of the radiological component of the mixed waste. (State of New Mexico, Environment Department, Response to Comments on Draft Order

under the New Mexico Hazardous Waste Act, Los Alamos National Laboratory, Nov. 26, 2002, at 21, attached hereto as Exhibit A).

EPA has consistently taken the position that a state may not use its hazardous waste authority to attempt to regulate the radioactive component of mixed waste. The State "must demonstrate that it can apply the RCRA regulations to the hazardous component of mixed waste, regardless of the classification of the radioactive component of the waste as high-level, low-level, transuranic, or other." (EPA State Authorization Manual, Vol. II, Appendix N, Mixed Waste Authorization Guide, Permittees Exhibit 52). Section 1006 of RCRA "precludes any regulation by EPA or a State which is inconsistent with the requirements of the Atomic Energy Act." 51 Fed.Reg. 24504 (Permittees Exhibit 62). The EPA has stated that "[t]he Regions should be especially careful in the following areas:...ascertaining that the State does not attempt to regulate the radioactive component of mixed waste under its hazardous waste authority." (December 1991 EPA Guidance on Delegation of Authorization Decisions, Permittee Exhibit 53). Therefore, NMED may not use its RCRA authorization to indirectly regulate the radiological portion of the TRU mixed waste.

In determining whether jurisdiction exists, the Hearing Officer should review the statements made by NMED in the Public Notice and Fact Sheet and the statements made by the State of New Mexico in an official press release, which was included by NMED in the administrative record, in the Green Gazette, issued by NMED, and other public statements made by state officials. (Modification Administrative Record, Doc. 27; Permittees Exhibits 15, 83).

The explicit objective of the proposed permit modification is to prevent the disposal of waste at WIPP that the State believes is high-level waste at WIPP. On October 28, 2003, the State of New Mexico issued a press release stating that the State was taking action "to prevent

waste at WIPP." (Administrative Record 27, attached hereto as Exhibit B). To address the State's concerns, the New Mexico Environment Department was ordered "to amend WIPP's state permit to specifically forbid any reclassified high-level waste from coming to WIPP." *Id.* The Department stated that the draft permit would be done by mid-November. (Exhibit C, attached hereto). The Santa Fe New Mexican, reporting on the press conference, stated that "[s]ince the state regulates hazardous materials at WIPP and not radionuclides, which fall under DOE's sole purview, the permit will address the issue of high-level nuclear waste only indirectly. Without specifying the details, Curry said the permit will focus on hazardous waste in nuclear sludges." (*Id.*).

Public Notice No. 03-12, announcing NMED's intent to modify the WIPP HWFP and the availability of the draft permit, was issued on November 26, 2003. The Winter 2004 issue of NMED's Green Gazette specifically states that the proposed permit modification was issued in direct response to the directive to amend the WIPP HWFP to prevent the disposal of high-level waste. "Following the ... October 28, 2003 directive to prohibit reclassified high-level waste at WIPP, NMED issued an agency-initiated permit modification. This modification looks to prevent any reclassified high-level waste from being sent to WIPP ... NMED's modification prevents reclassified waste from being sent to WIPP without asserting authority over the radioactive nature of the waste, reducing the likelihood that DOE will be able to mount a successful legal challenge to the permit modification." (Exhibit D, attached hereto). This last statement is an admission that the proposed permit modification is a subterfuge to avoid federal preemption.

In the Fact Sheet, all of the "events" identified as supporting the proposed modification address the State's concerns about the classification of the radiological components of the waste

sent to WIPP. Fact Sheet at 3-4. The Fact Sheet does not identify or address any concerns with the hazardous waste component of additional waste that may be sent to WIPP. NMED confirmed again in early April that the purpose of the permit modification is to prevent the disposal of waste that it believes is high-level at WIPP. "Our concern is that we want to make sure that the Department of Energy understands clearly the position of the state, that we don't want to take any reclassified high-level waste." (Exhibit E, attached hereto). NMED's statement, in its Response to the Motion to Dismiss, that "the concern is not necessarily with the radiological constituents contained in such waste," directly contradicts the public statements of State officials and the Fact Sheet.

In contrast to other cases where the court has inferred the purpose of the state action, the State and NMED have admitted the actual purpose of the agency-initiated permit modification. The evidence is dispositive. NMRA 11-801.D(2), 11-803.H. The Hearing Officer should find that NMED's purpose for the agency-initiated modification is to regulate the radiological component of mixed waste. Therefore, the proposed permit modification is beyond the Hearing Officer's authority and should be dismissed for lack of subject matter jurisdiction.

**II. NMED HAS NOT SET FORTH ANY SET OF PROVABLE FACTS THAT SUPPORT THE IMPOSITION OF THE PROPOSED PERMIT MODIFICATION.**

**A. Standard of Review.**

A motion to dismiss should be granted when it appears that a party cannot recover under any state of facts provable under the claim. *C&H Construction & Pav., Inc. v. Foundation Reserve Ins. Co.*, 85 N.M. 374, 512 P.2d 947 (1973). For the purposes of a motion to dismiss, inferences and legal conclusions drawn from the facts set forth in the pleadings are not accepted as true. *McNutt v. New Mexico State Tribune Co.*, 88 N.M. 162, 538 P.2d 804 (Ct.App. 1975);

*C&H Constr. & Paving Inc. v. Foundation Reserve Ins. Co., supra.* This matter was initiated by the issuance of the Public Notice and Fact Sheet. The Public Notice identifies the administrative record put forward by NMED in support of the proposed modification. Based on a review of the information NMED has provided in support of the proposed modification, there is no set of provable facts that would justify the proposed permit modification.

The Permittees are not arguing for dismissal on factual grounds. Instead, as set forth in the Motion to Dismiss, the proposed permit modification is not legally sufficient because it does not meet the requirements of 40 CFR § 270.41. In addition, the permit modification is arbitrary and capricious because there is no rational connection between the assertions set forth in the Fact Sheet, the regulatory requirements, the current permit conditions, and NMED's conclusion that, had the Department known of the allegedly "new" information, it would have imposed permit conditions in 1999 prohibiting WIPP from receiving non-TWBIR waste. *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶24, 125 N.M. 786 ("An agency's action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand"); *Colonias Development Council v. Rhino Environmental Services, Inc.*, 2003-NMCA-141, ¶5; *U.S. West Communications v. New Mexico State Corp. Comm'n*, 1997-NMSC-031, ¶8, 123 N.M. 554.

The Permittees arguments have been set forth in full in the Motion to Dismiss. For purposes of the Reply, the Permittees are only addressing NMED's argument that different permit conditions would have been justified when the WIPP HWFP was issued in 1999.

**B. NMED has not met its burden of showing that different permit requirements would have been justified when the WIPP HWFP was issued in 1999.**

NMED may modify the WIPP HWFP on its own initiative only if the Department can show that one or more of the causes for modification identified in 40 CFR § 270.41 exists. The

Department alleges that it has received new information that justifies the proposed permit modification. Section 270.41(a)(2) requires NMED to show that the Department has received new information that "was not available at the time of permit issuance" and that, if the information had been available at the time of permit issuance, it "would have justified the application of a different permit condition at the time of issuance."

The burden is on NMED, as the moving party, to demonstrate that the proposed permit modification meets the requirements of Section 270.41(a)(2). *Tenneco Oil Co. v. New Mexico Water Quality Control Commission*, 107 N.M. 469, 471, 760 P.2d 161 (N.M.App. 1987); *Duke City Lumber Co. v. New Mexico Environmental Improvement Board*, 95 N.M. 401, 622 P.2d 709 (N.M.App. 1980); *In re BMX Technologies*, 9 EAD 61, 73 (April 5, 2000). The ability of an agency to modify a permit based on new information is very narrow. 45 Fed.Reg. 33290, 33314 (May 19, 1980). In order to modify the WIPP HWFP, NMED is required to provide evidence, as the moving party, the permit should be altered because "the new information came to light unexpectedly and changes an erroneous assumption on which the original permit was based," and that the permit modification is needed to remove or alter "inappropriate permit terms that were based on the erroneous assumption." *In the Matter of General Electric Co.*, 4 EAD 615 (April 13, 1993).

NMED asserts, in the Fact Sheet, that the non-TWBIR waste "has not been evaluated by the state for compatibility with TRU mixed waste or for other characteristics that may make disposal at WIPP a danger to public health or the environment. It is on this basis that NMED proposes to modify the permit to prohibit wastes that are not directly traceable to the TWBIR." Fact Sheet at 4. Assuming, for the purposes of the Motion to Dismiss, that NMED is correct in stating the waste has not been evaluated for compatibility, NMED has not shown that different



permit conditions would have been justified in 1999. The WIPP HWFP establishes a method to meet the requirement that there be a determination of compatibility for all waste, regardless of whether or not the waste streams were identified in the TWBIR.

Compatibility of all waste accepted for disposal is assured by limiting the acceptable hazardous wastes to those listed in Part A of the permit application, which is incorporated into the HWFP. Part A contains a list of hazardous waste codes which identify the wastes that are compatible for disposal at WIPP. If a waste with a waste code not listed in Part A is offered to WIPP for management and disposal, the waste must either be rejected or the Permittees must submit a permit modification to request the addition of an applicable waste code. NMED has not shown that an additional mechanism is needed to evaluate compatibility beyond what is already required by the HWFP. NMED has not identified any "other characteristics" that may need to be evaluated or shown the impact of such unidentified characteristics on the ability to safely manage and dispose of TRU mixed waste at the WIPP facility.

In order to provide RCRA Permittees "with maximum certainty during the fixed term of their permits," the ability of the permitting agency to modify a RCRA permit is very narrow. 45 Fed.Reg. at 33310. "Normally a permit will not be modified during its term if the facility is in compliance with the terms of the permit." *Id.* at 33314. The burden is on NMED to identify the inappropriate permit terms that need to be removed or altered and to provide a regulatory and factual basis for the proposed permit modification. NMED cannot shift the burden to the Permittees to prove that the terms of the permit are applicable to non-TWBIR waste. Instead, NMED must prove that the terms of the permit *are not* adequate to assess the non-TWBIR waste.

NMED has not specified what additional information they believe the modification will provide that is not already required to be provided prior to the acceptance of waste for disposal.

The HWFP, by law, is required to include all of the necessary conditions needed to meet the regulatory requirements and to protect human health and the environment. Once a permit is issued, it is assumed that it contains all of the necessary permit conditions for compliance with the applicable regulations. *See* 40 CFR § 270.4.

NMED has not identified any specific dangers to public health and the environment that would result from accepting the non-TWBIR waste characterized and deemed acceptable in under the current terms of the HWFP.

NMED has offered no provable facts that the existing waste characterization methods will not work for non-TWBIR waste streams. As already set forth in the Motion to Dismiss, waste may be accepted for disposal only upon a showing that it meets the conditions of the HWFP, including the waste acceptance criteria and the WAP. Motion to Dismiss at 11-13. Waste acceptance criteria and a WAP are required precisely because, at the time a hazardous waste facility permit is issued, the Department and the owner or operator only know general information about waste that is expected to be sent to the facility. For example, the Department and the owner or operator may know that waste will be "mixed," consist of homogeneous solids or heterogeneous solids, or that the waste will not include free liquids. Specific parameters and limits for waste acceptability will be included in the WAP. The WAP sets forth a set of procedures, applicable to all wastes, that determine acceptability consistent with the requirements of the WAP.

NMED's allegation that the "Permittees have not demonstrated that characterization methods and procedures are adequate or sufficiently well developed to allow disposal at WIPP" is without proof or basis. Response to Motion to Dismiss at 11. The HWFP WAP requires that waste be identified by Summary Category Groups which reflect the chemical and physical

properties of the waste. It then prescribes characterization techniques (sampling methods, sampling frequency, and analysis methods) for each potential type of waste. The Summary of Parameters, based on Permit Table B-6, shows the applicable permit requirements. Any CH TRU mixed waste that falls within the entries in the left-hand column can be characterized for disposal at WIPP.

#### SUMMARY OF PARAMETERS

Waste Matrix Code Summary Categories	Characterization Parameter	Method
<b>RETRIEVABLY STORED WASTE</b>		
S3000-Homogeneous Solids	Physical waste form	100% radiography or visual examination
	Headspace gases X Gas volatile organic compounds (VOC)	100% gas sampling and analysis or statistical sampling
S4000-Soil/Gravel	Hazardous constituents X TCLP/total metals X TCLP/total VOCs X TCLP/total semi-VOCs	Statistical sampling
S5000-Debris Waste	Physical waste form	100% Radiography Visual examination (statistical sample) or visual examination
	Headspace gases X Gas VOCs	100% gas sampling and analysis, statistical sampling or assignment of VOC concentrations
	Hazardous constituents X TCLP/total metals X TCLP/total VOCs X TCLP/total semi-VOCs	Acceptable knowledge
<b>NEWLY GENERATED WASTE</b>		
S3000-Homogeneous Solids	Physical waste form	Documentation and verification or radiography. Applies to 100% of containers
	Headspace gases X Gas VOCs (VOCs)	100% gas sampling and analysis or statistical sampling
S4000-Soil/Gravel	Hazardous constituents X TCLP/total metals X TCLP/total VOCs X TCLP/total semi-VOCs	Statistical sampling
S5000-Debris Waste	Physical waste form	Documentation and verification or radiography. Applies to 100% of containers
	Headspace gases X Gas VOCs	100% gas sampling and analysis, statistical sampling or assignment of VOC
	Hazardous constituents X TCLP/total metals X TCLP/total VOCs X TCLP/total semi-VOCs	Acceptable knowledge

NMED has offered no provable facts demonstrating that the non-TWBIR waste cannot be adequately evaluated or characterized for compatibility or any other parameter of concern pursuant to the current requirements of the HWFP. Because the permit already requires a modification if a particular waste does not fall within the narrow boundaries of acceptable waste and acceptable methods, the proposed agency-initiated permit modification is unnecessary.

NMED has not provided any evidence that the proposed permit modification would produce any information upon which to base an approval for a shipment that is not already required by the permit and that is not already part of the waste acceptance process. NMED has not identified any regulations or facts that demonstrate that the current WIPP WAP requirements are insufficient to provide the knowledge needed for the safe management and disposal of TWBIR, non-TWBIR, repackaged, newly generated or any other class of waste.

NMED simply has not shown that the proposed permit modification is needed to alter or modify inappropriate permit terms. Therefore, its proposed modification is legally insufficient and should be dismissed.

**C. Permit Section B-1d does not demonstrate that NMED would have imposed permit conditions prohibiting non-TWBIR waste.**

NMED asserts in the Response to the Motion to Dismiss that the importance of the TWBIR is underscored by the "requirement" that the waste stream description from the TWBIR "must" be included on the Waste Stream Profile Form (WSPF) prior to disposal. Response at 8. In support of this argument, NMED cites to Section B-1d, "Control of Waste Acceptance," and Figure B-1, "Waste Stream Profile Form (Sample Only)." NMED's characterization of the information required on the WSPF is inaccurate. Section B-1d does not refer to TWBIR information or require the inclusion of any specific information from the TWBIR. Nor do the sections to which Section B-1d refers require inclusion of information from the TWBIR. The

form in Figure B-1 is labeled in the permit as a "Sample" and it suggests to the generator site that the TWBIR description could be entered if it provided the requisite description. However, the TWBIR description is not a required field and there is no consequence, such as the mandatory rejection of a particular waste stream, if the information is not provided. The only information required by the permit to be included on a WSPF is the information identified in Section B3-12(b)(1), which does not require TWBIR information.

**D. The current permit condition prohibiting remote-handled (RH) waste does not demonstrate that NMED would have imposed permit conditions prohibiting non-TWBIR waste is false.**

In support of the proposed permit modification, NMED cites to the current permit prohibition on the disposal of remote handled (RH) TRU waste. NMED argues that the fact that the permit prohibits the disposal of RH waste shows that different permit conditions would have been justified for non-TWBIR waste in 1999. The RH prohibition is not based on the fact that "NMED does not have adequate information, and has not performed adequate evaluations" of the RH waste. Response to Motion to Dismiss at 11. The disposal of RH waste is currently prohibited because "[a]pplicants have not provided sufficient information regarding procedures to characterize RH TRU waste in response to prior requests and notices to NMED" and "[a]pplicants concede that a permit modification must be obtained to add RH TRU mixed waste characterization methods in order to manage, store, and dispose RH TRU mixed waste at WIPP." (Report of the Hearing Officer, Finding of Fact 202, 203, Modification Administrative Record, Doc. 18 (cited by NMED, Response to Motion to Dismiss at 11)). The Permittees have made no such concession with regard to non-TWBIR waste. To the contrary, the Permittees have successfully used the WAP process on at least 8 occasions to qualify non-TWBIR waste streams for disposal at WIPP. The RH prohibition actually demonstrates that, as the Permittees' have

shown, NMED will rely on the WAP process, not the information in the TWBIR, to determine if waste is acceptable for disposal at the WIPP.

**E. NMSA 74-4-4.2(C) does not provide a legal basis for NMED to re-open the WIPP's permit to impose a new condition prohibiting non-TWBIR waste via the agency-initiated permit modification**

NMED's Response to Permittees' Motion to Dismiss, relying on NMSA 74-4-4.2(C), states that the agency-initiated permit modification "is attempting to regulate the disposal of any waste over which it has jurisdiction to assure that there is no danger to public health or the environment." (Response to Motion to Dismiss at 5). NMED cannot invoke this statutory section to avoid the requirements of Section 270.41(a)(2). A regulatory agency implementing RCRA "may not invoke its omnibus authority unless the record contains a properly supported finding that an exercise of that authority is necessary to protect human health or the environment." *In the Matter of Waste Technologies Industries, East Liverpool, Ohio*, 4 EAD 106, 114 (quoting *Sandoz Pharmaceuticals Corporation*, RCRA Appeal No. 91-14, at 7, EAB July 9, 1992). Because the NMED has not established a finding in its Fact Sheet or Public Notice that the current permit conditions, including the WAP, TSDF-WAC, and audit program, *are not* sufficient to protect human health or the environment with respect to non-TWBIR waste, NMED cannot rely upon NMSA 74-4-4.2(C) as a legal basis to reopen the WIPP's permit. Nor can NMED rely on this provision to avoid federal preemption, as argued in Section I, above.

**CONCLUSION**

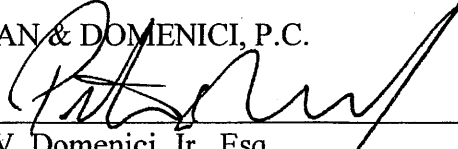
The NMED-initiated permit modification is an impermissible attempt to regulate the radiological component of hazardous waste, which is an area preempted by Federal law. Moreover because waste acceptance, both pursuant to RCRA and the WIPP HWFP, is based on compliance with the WAC, the TSDF-WAC and the WAP, not on inventory information

provided during the permit application process, NMED cannot show any set of provable facts that would justify the proposed permit modification. There is no rational connection between the issues raised in the Fact Sheet and the proposed permit modification, and the actions of NMED are arbitrary and capricious. Therefore, the proposed permit modification should be dismissed with prejudice.

WHEREFORE, the Permittees respectfully request that NMED's proposed permit modification, as described in Public Notice No. 03-12 and the accompanying Fact Sheet, be dismissed with prejudice.

Respectfully submitted,

DOLAN & DOMENICI, P.C.



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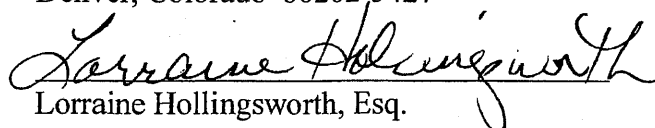
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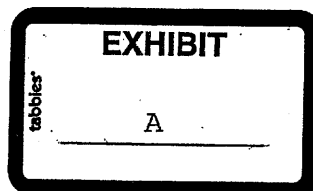
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**STATE OF NEW MEXICO**  
**ENVIRONMENT DEPARTMENT**  
**RESPONSE TO COMMENTS ON**  
**DRAFT ORDER UNDER THE NEW MEXICO**  
**HAZARDOUS WASTE ACT §§ 74-4-10.1 and 74-4-13**  
**LOS ALAMOS NATIONAL LABORATORY**  
**NOVEMBER 26, 2002**  
**VOLUME 1**



and "nickel." Moreover, the findings in the next section of the original Endangerment Determination (Paragraphs 53-111), which extensively describe releases of contaminants at the LANL facility, are based primarily on releases of contaminants other than radionuclides. See Section III of the original Endangerment Determination. The commenters also cite Paragraphs 112-119, the next section, of the original Endangerment Determination, which describes contaminants found in drinking water wells. Comments at 47. These findings are significant to show a pathway for migration of contamination from LANL to drinking water supply wells, regardless whether the individual contaminants that have been detected are shown to be exempt.

Moreover, many of the radioactive wastes described in the Endangerment Determination are not source, special nuclear, or byproduct material. Some of these radioactive wastes are produced from particle accelerators, and are not covered by the exemption. Some of these radioactive wastes may include exempt and non-exempt radionuclides, but they have been commingled so as to be inseparable.

Nevertheless, in response to this comment, the Environment Department is enhancing the references to chemical contaminants. See Order § II.A.

**Comment No. 28:** DOE and UC state that the Order would require "investigative, monitoring and corrective tasks addressed to radionuclides, including source, special nuclear and byproduct materials." Comments at 47-49, 63-64.

**Environment Department Response:** The Environment Department agrees that the Order requires monitoring and reporting of radionuclides that may be source, special nuclear, and byproduct material, as well as radionuclides that do not fall into these categories. The Environment Department has authority to require such monitoring and reporting.

In the final Order, the Environment Department is requiring monitoring and reporting of radionuclides that may be source, special nuclear, or byproduct material to the extent that such monitoring and reporting is incidental to regulation of solid and hazardous waste. Although the Order requires an investigation of groundwater, surface water, and soil contamination that is directed to contaminants from solid and hazardous wastes and hazardous constituents, monitoring and reporting of radionuclide contamination is very important for several reasons.

First, monitoring and reporting of radionuclides is necessary because detection of radionuclide can provide an indication of how other, hazardous contaminants are behaving. For example, tritium is a radionuclide that tends to migrate quickly in groundwater, and to precede other forms of contamination. In this way, tritium contamination can indicate the presence of ground water contamination moving toward a given monitoring well. It can establish the existence of a pathway for exposure to hazardous or solid waste constituents. Likewise, at any given solid waste management unit or other disposal area, one or another radionuclide may move more quickly than the hazardous constituents at that disposal area. The relative speeds of these constituents,

moreover, may be affected by myriad other factors, such as pH, soil porosity, or soil chemistry. Data on radionuclide contamination, while not the focus of the investigation, can nevertheless often provide valuable and important information to the persons conducting and reviewing the investigation.

Second, monitoring and reporting of radionuclides is necessary to ensure that samples and investigation derived wastes are handled properly. For example, if the Environment Department decides to take a split sample from a particular well, it needs to know if significant radionuclide contamination has been detected in that well previously, in order to handle and dispose of the sample properly. Radioactive samples are subject to special packaging and labeling requirements under Department of Transportation regulations. 49 C.F.R. pts. 171 to 179. Some laboratories may not accept radioactive samples for analysis, or may charge an additional fee for handling radioactive samples. See, e.g., New Mexico Environment Dep't Professional Services Price Agreement Laboratory Analytical Services at 35.

Third, monitoring and reporting of radionuclides is necessary for the Environment Department to determine appropriate cleanup levels for contaminants from solid and hazardous wastes and hazardous constituents. All radionuclides are classified as Class A carcinogens by the EPA, as described in the *April 2001 User's Guide: Radionuclide Carcinogenicity for the HEAST Radionuclide Table* from the EPA Office of Radiation and Indoor Air Radiation Protection. Radionuclides are considered carcinogens based on their property of emitting ionizing radiation and on the extensive weight of evidence provided by epidemiological studies. Radionuclides have been assigned HEAST slope factors for carcinogenicity and are evaluated by the same methods used for chemical carcinogens. Under RCRA, the Environment Department screens all media at sites against its target goal of  $10^{-5}$  total excess risk of cancer for the site. Therefore, the individual screening level for each carcinogen can be divided by the number of carcinogens known to be present at the site to generate the screening level for that site for each individual carcinogen. Alternatively, the concentration of each carcinogen present can be divided by its screening level and multiplied by  $10^{-5}$ ; these contributions are summed to generate the total carcinogenic risk from the site. Either method requires knowledge of the total number of carcinogens, including radionuclides present at the site. This information is used to set risk-based cleanup levels for *non-radioactive* contaminants at the site. The total risk goal is delineated in section 1.2.3 (Target Risk and Hazard) of the Environment Department guidance, *Technical Background Document for Development of Soil Screening Levels* (NMED-00-008). As EPA states in the proposed Subpart S rule, "All other factors being the same, the media cleanup standard for a constituent present in a medium that is contaminated with many other constituents posing significant risks may be established at a lower concentration than if that constituent were the sole contaminant in the medium." 55 Fed. Reg. 30,798, 30,827 (July 27, 1990).

Such requirements for monitoring and reporting of radionuclides incidental to regulation of solid and hazardous wastes was upheld by the federal district court and by the Tenth Circuit in *United States v. New Mexico*, 35 Env't Rep. Cas. (BNA) 1693

(D.N.M. 1992), *aff'd* 32 F.3d 494 (10th Cir. 1994). Indeed, the original permit, Module VIII, issued by EPA under RCRA, included very similar requirements for monitoring and reporting of radionuclides. See LANL Hazardous Waste Facility Permit, Module VIII, Special Conditions Pursuant to the 1984 Hazardous and Solid Waste Amendments to RCRA for the Los Alamos National Laboratory, at 8, 10, 18, 42, 46, 51, 52, and 53.

Moreover, the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. §§ 2011 to 2297g-4, does not provide for such monitoring and reporting for purposes of environmental cleanup. The AEA does not address protection of the environment, and it does not provide for investigation and cleanup of environmental contamination. Thus, the AEA does not preempt the field of environmental cleanup. *United States v. Kentucky*, 252 F.3d 816, 821 (6th Cir. 2001), upon which the commenters rely, does not hold otherwise. The state law found to be preempted in *Kentucky* was not a cleanup requirement. Rather, it was permit requirement for disposal of radionuclides in a solid waste landfill. 252 F.3d at 820.

The Order also requires monitoring and reporting of radionuclide contaminants that are not clearly source, special nuclear, or byproduct material. Many of the radionuclide contaminants at LANL are non-exempt accelerator produced radioactive material (ARM), which are not regulated under the Atomic Energy Act and which the Environment Department has authority to regulate. See Response to Comment No. 40 below. Thus, the Order requires monitoring and reporting of tritium. Tritium can be produced in a nuclear reactor, in which case it is byproduct material, or it can be produced in a particle accelerator, in which case it is neither source, nor special nuclear, nor byproduct material and therefore, once discarded, meets the definition of solid waste. See *Gassie v. SMH Swiss Corp.*, 1999 WL 539489 at \*2 (E.D. La. 1999) ("If tritium is produced in a nuclear reactor, it is 'byproduct material' within the meaning of" the AEA; though "not all tritium is byproduct material"). Other examples of radionuclides that are commonly produced in accelerators, include cobalt-60, sodium-22, krypton-81. See, e.g., DOE, *Integrated Data Base Report – 1996: U.S. Spent Nuclear Fuel and Radioactive Waste Inventories, Projections, and Characteristics* at 7-8 (Revision 13 Dec. 1997). LANL has operated several particle accelerators at the facility, including four accelerators operated during World War II; a high-energy Van de Graaff located at TA-3, Building 16; a cyclotron located in the Physics Building at TA-3; a Low-Energy Demonstration Accelerator located at TA-53, Building 365, which operated from approximately 1998 until 2001; and a proton linear accelerator at the Los Alamos Neutron Science Center in TA-53, which began operating in 1972. Letter from Ralph E. Erickson, DOE and James L. Holt, LANL to James Bearzi, Environment Department (Sept. 20, 2002). These accelerators produced radioactive waste that has been disposed at LANL. For example, accelerator produced radioactive waste, including cobalt-60, sodium-22, strontium-90, and tritium have been disposed in lagoons at TA-53. LANL, *Interim Action Plan for Potential Release Site 53-002(a)* (LA-UR-01-5535) at A-4 to A-8 (Nov. 2001).

Contrary to the assertions of DOE and UC, the Order does not require any cleanup measures to specifically address radionuclides. However, the Environment

Department may require cleanup of radionuclides that are not source, special nuclear, or byproduct material

**Comment No. 29:** DOE and UC state that the Order requires "immediate corrective action relating to many SWMUs containing radionuclides." In particular, the commenters refer to the Order's requirement for soil and tuff removal or site stabilization at the site of the former radioactive liquid waste disposal plant at TA-21. Comments at 48.

**Environment Department Response:** The Environment Department does not disagree with the factual statement of this comment. While the Order requires corrective action for certain solid waste management units, these units contain solid or hazardous wastes or hazardous constituents. Indeed, the fact that these units have been designated "solid waste management units" indicates that they have received solid wastes. While these units also contain radionuclides, that fact is incidental. For example, the former radioactive liquid waste disposal plant, to which the commenters refer, used ferric sulfate<sup>6</sup> to treat radioactive wastes prior to disposal. The plant discharged metals including copper, mercury, lead, and zinc, and chlorinated solvents. LASL, *Environmental Surveillance at Los Alamos During 1973* (May 1974); DOE, *Comprehensive Environmental Assessment and Response Program Phase I* (1987). Soil at the plant site has contained, among other contaminants, mercury and trichloroethylene. LANL, *Voluntary Corrective Measures Plan for Solid Waste Management Unit 21-011(k) at Technical Area 21* (LA-UR-02-6797) at 15 (Revision 2 Oct. 2002).

**Comment No. 30:** DOE and UC assert that the order "unlawfully" sets radionuclide cleanup levels by including calculated excess cancer risks in establishing cleanup levels for other constituents. Comments at 48-49.

**Environment Department Response:** The Environment Department disagrees with this comment. This issue is addressed in response to Comment 28.

**Comment No. 31:** DOE and UC state that the Atomic Energy Act ("AEA") established a comprehensive scheme for the regulation of source, special nuclear, and byproduct material. Comments at 49-53.

**Environment Department Response:** The Environment Department does not agree that the AEA establishes a comprehensive regulatory scheme for environmental regulation of source, special nuclear, and byproduct material. Nevertheless, the final Order does not include, and is not intended to include, any requirements that regulate source, special nuclear, or byproduct material. The Order only contains requirements for monitoring and reporting of radionuclides as incidental to regulation of solid and hazardous waste. The Environment Department has added a new paragraph in Section I (Introduction) of the final Order to clarify this issue, largely in response to this and similar comments. Order at 2.

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<sup>6</sup> Ferric sulfate, once discarded, is a solid waste under RCRA and the HWA. It is also a "hazardous substance" under CERCLA. 40 C.F.R. § 302.4 (Table 302.4).



# State of New Mexico

Office of the Governor

**Bill Richardson**  
Governor

For immediate release  
10/28/03

Contact: Gilbert Gallegos  
505.476.2217

## Governor Bill Richardson acts to prevent high-level Waste at WIPP

**SANTA FE** – Governor Bill Richardson today said he will take action to prevent high-level waste from being shipped to the WIPP facility in New Mexico.

Governor Richardson delivered the following remarks today during a news conference:

Thank you for being here today.

As many of you are aware, despite losing in federal court, the U.S. Department of Energy recently asked Congress to grant the power to reclassify its own radioactive waste. DOE wants to re-label "high-level" waste as "low-level" and either leave it in the ground or send it to the Waste Isolation Pilot Project near Carlsbad.

I want to make my position clear: I will not allow high-level waste in New Mexico – no matter what new name DOE comes up with to characterize it. As Congressman and Secretary of Energy, the safety of New Mexicans was my top concern. As Governor, it remains my top priority.

This waste would be no different than it was before. Waste that has been deemed as high-level for decades would suddenly become low-level on DOE's whim.

To make sure that New Mexico's concerns are addressed, I have ordered New Mexico Environment Department Secretary Ron Curry to amend WIPP's state permit to specifically forbid any reclassified high-level waste from coming to WIPP. WIPP was not designed or permitted to handle high-level waste, no matter what you call it.

This is about so much more than a fight over labels on drums. It is about promises that were made to the people of New Mexico when WIPP opened, and making sure those promises are kept. The promise was clear-cut – WIPP would only accept transuranic waste, period.

If DOE is granted the power to reclassify its own waste and nothing is done to prevent it from going to WIPP, estimates are that approximately 15,000 high-level drums could be sent there. In these drums would be a toxic sludge, the leftovers from decades of weapons production in Idaho, South Carolina and Washington State. This sludge is the very definition of high-level waste. The court agrees. A federal circuit court judge ruled this summer that any DOE effort to summarily reclassify its waste would violate the Nuclear Waste Policy Act of 1982.



# State of New Mexico

*Office of the Governor*

**Bill Richardson**  
*Governor*

The DOE has said time and again, most recently in a Saturday Op-Ed in the Albuquerque Journal, that it does not intend to send high-level waste to WIPP. While I hope this is true, I know that the action I have announced today will ensure they stand by their word.

I have a personal connection to WIPP. I opened the facility only after I was confident that environmental safeguards would be met. This action will help make sure that those agreements are lived up to, now and in the future.

The DOE is a vital part of this state's economy and culture. We appreciate the work that the Department's employees, in Los Alamos, Albuquerque and Carlsbad, do every day. But we need to make sure that decisions that are being made at DOE's highest policy levels reflect what is best for New Mexico.

I am pleased to say that I have spoken to both Senators Domenici and Bingaman and both agree with me and oppose DOE's effort to reclassify high-level waste.

Safety will not be compromised.

## WIPP Fight Vowed

By John Fleck  
Journal Staff Writer

Gov. Bill Richardson said Tuesday the state of New Mexico will try to block a Department of Energy plan to send radioactive sludge classified as high level to the Waste Isolation Pilot Plant near Carlsbad.

Richardson directed Environment Secretary Ron Curry to amend WIPP's state operating permit, preventing DOE from sending the waste to New Mexico.

The gambit by Richardson, who as the Clinton administration's secretary of Energy opened WIPP, is the latest move in an increasingly high-stakes contest over federal plans for the disposal of nuclear waste from old nuclear weapons plants in Idaho, South Carolina and Washington state.

DOE wants to send some of the waste to WIPP, but a federal court ruled against the department in July, saying the waste in question is high-level, which is prohibited at WIPP.

DOE is asking Congress to change the classification of the sludge so it would be allowed at WIPP.

"WIPP was not designed or permitted to handle high-level waste," Richardson said during a Tuesday afternoon news conference in the capitol. "It's about promises that were made to the citizens of New Mexico when WIPP was opened."

Located in the desert east of Carlsbad, WIPP is a 2,000-foot-deep salt mine used to bury nuclear-weapon manufacturing waste contaminated with plutonium and similar radioactive elements.

Richardson accused DOE of using bureaucratic sleight-of-hand to reclassify high-level nuclear waste as something else in order to get around the legal prohibition against disposing of it at WIPP.

"I will not allow high-level waste to come to New Mexico no matter what new name the Department of Energy comes up with to characterize it," Richardson said.

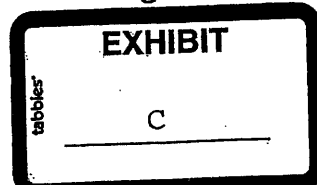
DOE officials insist they are doing nothing of the sort. The sludge in question is no more radioactive than other waste already planned for WIPP, and it meets federal regulations governing WIPP, said department spokesman Joe Davis.

"We will not send high-level waste to WIPP," Davis said.

The waste in question is sludge left when nuclear reactor fuel was dissolved in acid to extract plutonium for nuclear bombs. The waste now sits in steel tanks, most of it at the Hanford nuclear reservation in eastern Washington state.

Richardson noted that, as Energy secretary, he opened WIPP in 1999 "only after I was confident that environmental safeguards would be met." Amending WIPP's state permit is an attempt to ensure those safeguards continue, Richardson said.

Page 1 of 2





Curry at the news conference said it could take as long as a year for the permit amendment to be completed. A draft of the amendment will be done by mid-November, after which the public and government agencies will have 45 days to submit comments.

A public hearing also will be required, Curry said.

Because of public notice requirements and other rules, it should take between six and 12 months for the amendment to be completed, Curry said.

## **Gov. Criticizes Nuclear-Waste Proposal**

By JEFF TOLLEFSON | The New Mexican

Gov. Bill Richardson is taking aim at the agency he formerly headed, the U.S. Department of Energy, in an effort to ensure that no high-level nuclear waste makes its way to New Mexico.

Speaking at a news conference Tuesday, Richardson criticized a DOE proposal to downgrade certain high-level nuclear waste, a move that would make some of the material eligible for disposal at the Waste Isolation Pilot Plant outside Carlsbad.

"I will not allow high-level waste to come to New Mexico," said Richardson, who served as secretary of energy in the Clinton administration. "WIPP is not designed or permitted to handle high-level waste, and it will not do so, no matter what you call it."

The governor has directed the New Mexico Environment Department to amend the state's operating permit for WIPP to forbid the disposal of reclassified high-level waste.

DOE's proposal targets nuclear sludges in various storage tanks in Idaho, South Carolina and Hanford, Wash. High-level waste must go to a federally designated site, such as the Yucca Mountain repository in Nevada. If some of that waste was characterized as low-level and transuranic waste, however, it could be buried on site or shipped to WIPP.

State officials cite federal law defining high-level waste as that derived from the reprocessing of spent nuclear fuel, "including liquid waste ... and any solid material derived from such liquid waste." Sludges at the bottom of the tanks meet that definition.

On the other hand, DOE says once the high-level waste is removed, those same sludges might qualify as transuranic waste, the kind that is currently going to WIPP.

Richardson said he believes DOE is under pressure to find a place for its nuclear waste. Nonetheless, he said, it must abide by, rather than rewrite, the regulations it agreed to years ago.

DOE maintains its plan has been mischaracterized. The agency says no high-level waste would be shipped to WIPP.

In an effort to be conservative, the agency has managed all of the radioactive sludges as high-level waste for years, DOE spokesman Joe Davis said Tuesday.

Davis said DOE is now examining and classifying — not "reclassifying" — that waste and finding that some of it might actually be low-level or transuranic.

Davis said the plan stems from an environmental-impact statement issued in 1999, when Richardson was energy secretary, for a DOE site in Idaho. That document indicated that sludge currently stored in tanks in Idaho was transuranic waste that could be disposed of at WIPP.

"The issue here is whether we are going to ship high-level waste to WIPP," Davis said. "We will not ship high-level waste to WIPP. We can't. Federal law won't allow us to do that."

But that explanation has drawn sharp criticism, both among environmental watchdogs and in the courts.

A federal judge this summer shot down DOE's proposal in Idaho, so the agency is now asking Congress for direct authorization to move forward with the plan.

Because both of New Mexico's U.S. senators, Republican Pete Domenici and Democrat Jeff Bingaman, are against the proposal, Richardson said DOE will have a difficult time seeking legislation in Congress.

Nonetheless, he said, the Environment Department should amend the permit as a precaution in the event DOE prevails.

"This has been a concern of ours for quite some time, and it's good to see the governor stepping up to the plate," said Geoff Petrie, who works on nuclear-waste issues for Nuclear Watch of New Mexico.

"WIPP was never set up to accept high-level waste, and it's good to see that the governor remembers that."

Environment Department Secretary Ron Curry said the agency plans to put a draft of the permit modification out for public comment by November, followed by a public hearing. He said the entire process could take six to 12 months.

Since the state regulates hazardous materials at WIPP and not radionuclides, which fall under DOE's sole purview, the permit will address the issue of high-level nuclear waste only indirectly. Without specifying the details, Curry said the permit will focus on hazardous waste in nuclear sludges.

Curry said DOE is setting an alarming precedent by going to Congress to change the way it handles nuclear waste. In addition to the current debate over high-level waste, he said, DOE has also bypassed New Mexico's regulatory process by asking Congress to amend the requirements for analyzing nuclear waste before shipment to WIPP.

Domenici sponsored the latter legislation, which is pending.

"One of the problems we have with DOE is they are a self-regulating agency in many cases," Curry said in an interview after the news conference. Moreover, he added, DOE has a habit of trying to change the rules at WIPP, despite promises made long ago.

"DOE continues to eat away at those promises," he said. "This is an effort to stop that nibbling."



# THE GREEN GAZETTE

THE NEW MEXICO ENVIRONMENT DEPARTMENT NEWSLETTER

VOLUME 1, ISSUE 1

WINTER 2004

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THIS STATEMENT IS THE PROPERTY OF THE NEW MEXICO ENVIRONMENT DEPARTMENT. IT IS TO BE RETURNED TO THE DEPARTMENT IF IT IS FOUND IN THE HANDS OF ANY OTHER PERSON.

## Ground Water Quality Bureau

### UPDATED WASTEWATER REUSE POLICY PROTECTS RESOURCES

Already in use at golf courses and other sites around the state, irrigation with treated wastewater helps preserve New Mexico's potable water resources. A policy recently updated by NMED's Ground Water Quality Bureau will better promote this use while protecting human health.

The policy establishes strong health requirements including limits on ponding and spraying as well as mandatory posting of bilingual notices identifying application areas.

Under the new policy reclaimed wastewater, which is treated and disinfected, has uses including dust suppression at construction sites, snow-making,



### RIO CHAMA

and irrigation. These uses lessen demands on our limited freshwater resources.

This policy is the product of an NMED organized group that included representatives of the Department of Health, Municipal League and industry.

## 2003 EMPLOYEES OF THE YEAR

In honor of their exemplary service and record of high performance, the following NMED employees are the Department's Employees of the Year for 2003. To carry this new tradition forward, a new Employee Recognition Committee is being formed to select employees of the quarter and year in the future as well as to coordinate Department-wide events and celebrations. Each Division will have a representative on the Employee Recognition Committee. Administrative leave will be granted along with each award and for participating on the committee. Employees of the year get three days off, quarterly award winners get two days off and committee members get one day off.

NMED's 2003 Employees of the Year are:

**Lucy Dunn, Field Operations Division.** From her office in Las Cruces Lucy developed the Access budgeting system used by many bureaus and has been responsible for the acquisition and disbursement of computer software. She prepared the Field Operations Division Newsletter and has effectively coordinated and improved information Technology services in the field offices.

**Kevin Koch, Environmental Protection Division.** Kevin was called to military duty for several months last year, leaving behind a two-month-old son and four-year-old daughter. When he returned to his job at OHSB, he quickly realized we were behind in meeting our goals for Consultation. Kevin jumped in with both feet and brought the Consultation Section up to speed. Kevin has worked hard to expand the Partnership Agreements and Voluntary Protection Programs we have between industries in New Mexico and the Department. Kevin has also worked hard on putting forth the Hispanic Initiative for the OHSB.

**Connie Marquez, Administrative Services Division.** Connie is always willing to assist bureaus and go the extra mile to ensure effective human resource management. She managed the Personnel Services Bureau smoothly during the transition from Cliff Hawley to Judy Bentley. She is always competent and friendly.

CONTINUED ON PAGE 6

EXHIBIT

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## MESSAGE FROM THE SECRETARY

Welcome to the "new" NMED.

For the last few months, myself, Deputy Secretary Derrith Watchman-Moore and the senior staff team as well as the bureau chiefs and district managers have met several times to discuss the future direction of this agency. We have talked a lot about the Department's three guiding principles of **environmental holism, diversity and a high performance workforce**, as well as uncovering tangible accomplishments that can help get us closer to these goals.



I'm happy to say that the newsletter you are holding in your hand or eyeballing on your screen realizes one of these accomplishments. There are more to come including a revamped employee recognition program and an orientation for all Department employees, old and new, about NMED's mission, goals and procedures. I hope that these efforts will help us work together to achieve our common goals.

NMED is the most diverse agency in state government with responsibility for everything from a Portales Dairy Queen to Los Alamos National Laboratory. This breadth and the quality of our work in all these areas are reflected in the Department's accomplishments for 2003 included in this issue.

Taken singularly, each one of these accomplishments is very impressive. Taken as a whole, these accomplishments lay a great foundation for the future. Let's build on that foundation this year and show New Mexico that they ain't seen nothing yet!

Sincerely,

  
Ron Curry  
CABINET SECRETARY

Thank you to the following contributing writers for their submittals:

Ruth Ann Greuling- Solid Waste Bureau  
Eria Murphy- Ground Water Quality  
Julie Arvidson- Surface Water Quality  
Andy Berger- Air Quality Bureau  
Mike Taylor- Radiation Protection Bureau  
Michelle Vattano- Pollution Prevention

On average,  
Americans  
throw away  
20,000 televi-  
sions, 150,000  
tons of packag-  
ing materials,  
and 43,000 tons  
of food per  
day.

## NMED Accomplishments

*NMED has enjoyed many successes in the past year. These include:*

**WIPP High Level Waste:** Following the Governor's October 28, 2003 directive to prohibit reclassified high-level waste at WIPP, NMED issued an agency-initiated permit modification. This modification looks to prevent any reclassified high-level waste from being sent to WIPP. This move came after attempts by DOE to reclassify radioactive sludge currently stored at Hanford. NMED's modification prevents reclassified high-level waste from being sent to WIPP without asserting authority over the radioactive nature of the waste, reducing the likelihood that DOE will be able to mount a successful legal challenge to the permit modification.

**Regional Haze:** The Environmental Improvement Board (EIB) approved the Department's proposed Regional Haze State Implementation Plan and all associated regulations including a new Smoke Management Plan for the state. By doing this we became only the second state in the country to take meaningful steps to combat regional haze. The plan complies with section 309 of the Federal Regional Haze Rule and has been determined by EPA to demonstrate reasonable progress towards returning visibility in New Mexico's national parks and wilderness areas to natural background conditions by 2064. In conjunction with this, the board approved the Department's proposal for a new Open Burning regulation that will ban the burning of dioxin emitting household refuse beginning in June of next year.

Continued on page 4

## WIPP Growth Seen as Leverage Point

By John Fleck  
Journal Staff Writer

New Mexico's environment secretary recently threatened to block permission for a key expansion of WIPP's operations if the Department of Energy continues to try to gain approval to send new types of radioactive sludge to the waste dump.

The two issues—the expansion and the sludge—are not directly related. But the expansion, which is a top DOE priority, gives the state leverage on the sludge issue, which has been highly contentious.

The expansion would allow highly radioactive "remote-handled waste" at WIPP for the first time, but it requires a state permit. Until the DOE drops its effort to bring the sludge to WIPP, the state will not take action on the remote-handled waste permit, New Mexico Environment Secretary Ron Curry said in an interview Thursday.

The DOE counters that the state is required by law to deal with the remote-handled waste permit independent of other issues.

"We are confident Secretary Curry and the New Mexico Environment Department will fulfill their obligation under the law to decide on our application on its merits," said DOE spokesman Joe Davis.

The sludge, now located in tanks at the DOE's Hanford reservation and elsewhere, qualifies as "high-level waste," according to a ruling issued last summer by a federal court in Idaho. High-level waste is prohibited from WIPP by law.

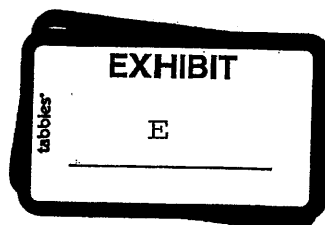
The DOE is trying, both through an appeal of the court decision and through congressional action, to win the right to reclassify the waste so it can be sent to WIPP.

This infuriated New Mexico Gov. Bill Richardson, who called a news conference last October to criticize DOE.

"WIPP was not designed or permitted to handle high-level waste," Richardson said at the time. "It's about promises that were made to the citizens of New Mexico when WIPP was opened."

Meanwhile, DOE is trying to win approval to dispose of other waste, called "remote-handled waste" because of its high levels of radioactivity. Remote-handled waste requires a state permit, which the state Environment Department was expected to grant.

Curry's comments suggest that the willingness to deal with the remote-handled waste permit are now tied to the separate discussion over whether the DOE will send the sludge to WIPP.



In linking the two, the state is repeating a tactic used most recently in a battle over environmental cleanup. In that case, Richardson said the state would play "hardball," blocking the WIPP expansion if the DOE did not agree to settle a dispute over an environmental cleanup order the state issued for Los Alamos National Laboratory.

Curry acknowledges that the state is using the same tactic in this case.

"Our concern is that we want to make sure that the Department of Energy understand clearly the position of the state, that we don't want to take any reclassified high-level waste, and that we're willing to make that point in the same manner as we made the point of how important the Los Alamos order was to us," Curry said.

In an attempt to find a way out of the impasse over the issue, Sen. Jeff Bingaman, D-N.M., on Friday called for an independent assessment of the waste classification issue by the National Academy of Sciences.

"An examination by the academy, under rigorous peer review, would help resolve many of the issues between the DOE, the Congress, and the states which have cleanup operations under way," Bingaman said in a letter to the DOE. "For New Mexico, such a study is essential to understand the impact that reclassification will have on WIPP operations."